Lim Eng Chong v SG Sarawak Recycle Industries Sdn Bhd & Ors

HIGH COURT (KUCHING) — APPLICATION FOR EXECUTION NO KCH-38–4/4 OF 2012
RHODZARIAH BUJANG J
11 OCTOBER 2013

Civil Procedure — Irregularity — Substantive defect — Application to set aside auction sale after order making sale absolute — Whether mere procedural irregularity or substantive defect — Whether curable under O 2 r 1(1) of the Rules of Court 2012

Land Law — Sale of land — Auction — Property sold by public auction pursuant to prohibitory order ('PO') — Purchase price settled by successful bidder — Previous owner surreptiously transferring his share in property to third party before order of confirmation of sale made — Successful bidder applying to set aside sale and for return of purchase price after order of confirmation of sale made — Whether application to set aside sale must be made before order making sale absolute — Rules of Court 2012 O 47 r 7

A landed property belonging to the defendant was sold by public auction ordered by the court pursuant to a prohibitory order ('PO') obtained by the plaintiff. The PO was due to expire on 17 October 2012. The transferee was the successful bidder at the auction held on 2 October 2012. He paid the balance of the purchase price within the time allotted for doing so but unbeknownst to him and the plaintiff, the defendant had surreptiously transferred his half share in the property to a third party on 18 October 2012, the very next day after the PO expired. Not knowing about this transfer, the plaintiff obtained an order of confirmation of the sale under O 47 r 7(h) of the Rules of Court 2012 ('ROC') and payment out of the proceeds from the sale. When the transfer to the third party was uncovered, the transferee applied to the court to set aside the sale of the property to him as well as for the return of the full purchase price. The senior assistant registrar refused the application and hence this appeal against that decision.

Held, dismissing the appeal with no costs:

(1) Order 47 r 7 provides for two instances when a sale can be set aside: where there is 'a material irregularity or fraud in publishing or conducting it' (r 7(f)) or where 'the judgment debtor has no saleable interest in the property sold' (r 7(g)). The applicant brought herself under the last

provision. However in r 7(h)(i) it is provided that where no application is made under either of the two sub rules quoted above, the Judge shall make an order confirming the sale, and thereupon the sale shall become absolute but with the proviso that such an order shall not be made until after the expiration of one month from the date of sale. Hence, the application to set aside the sale must be made before the order making the sale absolute. The facts of this case did not fit into that provision as the application to set aside the sale was made after the order making the sale absolute (see para 2).

(2) There were no procedural irregularities which could induce the court to invoke O 2 r 1(1) of the ROC in order to cure the same. The irregularity here actually went right into the substance of the application itself. The application was made after the sale had been made absolute when the law actually requires it to be made before that. The court could not overcome this substantive defect even though its apparently unjust result to the applicant (see para 4).

(3) Once the sale had been made absolute and payment out ordered, the proceeding was actually put to an end. The recourse of the purchaser was to file a fresh action for restitution and not by way of an application in the execution proceeding (see para 5).

[Bahasa Malaysia summary

Hartanah yang dimiliki oleh defendan dijual oleh lelongan awam yang diperintahkan oleh mahkamah berikutan kepada perintah larangan ('PO') yang diperolehi oleh plaintif. PO akan tamat pada 17 Oktober 2012. Penerima pindahan adalah pembida yang berjaya pada lelongan yang diadakan pada 2 Oktober 2012. Dia membayar baki harga belian dalam masa yang diberikan untuk berbuat sedemikian tetapi tanpa pengetahuan dia dan plaintif, defendan telah secara rahsia memindah sebahagian syernya di dalam hartanah tersebut kepada pihak ketiga pada 18 Oktober 2012, pada hari berikut selepas tamatnya PO tersebut. Tanpa pengetahuan mengenai pindahan ini, plaintif memperolehi perintah pengesahan jualan di bawah A 47 k 7(h) Kaedah-Kaedah Mahkamah 2012 ('KKM') dan bayaran daripada hasil daripada jualan tersebut. Apabila pindahan kepada pihak ketiga diketahui, penerima pindahan memohon kepada mahkamah untuk mengetepikan jualan hartanah kepadanya dan juga untuk pengembalian harga penuh belian tersebut. Timbalan kanan pendaftar menolak permohonan tersebut dan maka rayuan ini terhadap keputusan tersebut.

Diputuskan, menolak rayuan tanpa kos:

(1) Aturan 47 k 7 memperuntukkan untuk dua keadaan apabila jualan boleh diketepikan: di mana terdapat 'a material irregularity or fraud in publishing or conducting it' (k 7(f)) atau di mana 'the judgment debtor

has no saleable interest in the property sold' (k 7(g)). Pemohon terangkum di bawah peruntukan terakhir. Walau bagaimanapun dalam k 7(h)(i) adalah diperuntukkan bahawa apabila tiada permohonan dibuat di bawah kedua-dua sub kaedah yang dirujuk di atas, hakim akan membuat perintah mengesahkan jualan, dan oleh itu jualan akan menjadi mutlak tetapi dengan peruntukan bahawa perintah sedemikian tidak dibuat sehingga selepas tamat satu bulan dari tarikh jualan tersebut. Maka, permohonan untuk mengetepikan jualan tersebut mesti dibuat sebelum perintah membuat jualan itu mutlak. Fakta kes ini tidak terangkum dalam peruntukan tersebut memandangkan permohonan untuk mengetepikan jualan dibuat selepas perintah membuat jualan tersebut menjadi mutlak (lihat perenggan 2).

(2) Tidak terdapat luar aturan prosedur yang boleh menyebabkan mahkamah untuk membangkitkan A 2 k 1(1) KKM untuk mengatasinya. Luar aturan di sini sebenarnya merujuk kepada isi permohonan itu sendiri. Permohonan dibuat selepas jualan telah dijadikan mutlak apabila undang-undang hanya memerlukan ia dibuat sebelumnya. Mahkamah tidak dapat mengatasi kecacatan substantif ini walaupun ia jelas keputusan tidak adil kepada pemohon (lihat perenggan 4).

(3) Apabila saja jualan telah dijadikan mutlak dan bayaran diperintahkan, prosiding sebenarnya telah berakhir. Jalan keluar pembeli adalah untuk memfailkan tindakan baru untuk pemulangan dan bukan dengan cara permohonan di dalam prosiding pelaksanaan (lihat perenggan 5).]

Notes

For cases on auction, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4596–4625.

Cases referred to

Dr Michael Atun Wee v Malaysia Credit Finance Bhd & Ors [1994] 3 MLJ 594, SC (refd)

Haji Yahaya bin Haji Ahman & Anor v WE Perera & Anor [1977] 1 MLJ 32 (not folld)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622, FC (not folld)

Malayan Banking Bhd v Koay Kang Chuwan & Anor [2010] 5 MLJ 46, CA (not folld)

Oriental Bank Bhd v Nordin Hamid & Ors [2010] MLJU 1905; (Civil Appeal No W-02–1259 of 2005), CA (refd)

Legislation referred to

Rules of Court 2012 O 2 r 1(1), O 47 r 7, 7(f), (g), (h)(i)

Rules of the High Court 1980 O 15

Alex Lau (Detta Samen & Co) for the appellant/purchaser.
Peter Hii (Loke, King, Goh & Partners) for the plaintiff.

Rhodzariah Bujang J:

RULING

[1] A landed property belonging to the defendant was sold by public auction ordered by the court pursuant to a prohibitory order obtained by the plaintiff against him on 17 April 2012. The prohibitory order has a life span of six months and due to expire on 17 October 2012. One Liew Chiew Nyuk was the successful bidder at the auction held on 2 October 2012. He paid the balance of the purchase price within the time allotted for doing so on 31 October 2012 but unbeknownst to him and the plaintiff, the defendant had surreptiously transferred his half share in the property to a third party on 18 October 2012, the very next day after the prohibitory order expired. Meanwhile, whilst still deep in their ignorance of the transfer, the plaintiff obtained an order of confirmation of the sale under O 47 r 7(h) and payment out of the proceeds from the sale. It was only when the Lands and Surveys Department rejected the memorandum of transfer by way of share after the defendant failed to deliver the original document of title that the transfer to the third party was uncovered. The purchaser therefore applied to the court to set aside the sale of the property to him as well as for the return of the full purchase price. The learned senior assistant registrar refused the application; hence this appeal against that decision now before me.

A JUST COURSE OF ACTION

[2] It cannot be denied that the plaintiff and the purchaser are both the victims here and this decision I make will not be fair if I do not examine the legal provision relevant to this dispute first and that is O 47 r 7 mentioned earlier. The said rule provides for two instances when a sale can be set aside: where there is 'a material irregularity or fraud in publishing or conducting it' (r 7(f)) or where 'the judgment debtor has no saleable interest in the property sold' (r 7(g)). The applicant is bringing herself under the last provision. However in r 7(h)(i) it is provided that where no application is made under either of the two sub-rules quoted above, the judge shall make an order confirming the sale, and thereupon the sale shall become absolute but with the proviso that such an order shall not be made until after the expiration of one month from the date of sale. Thus, with respect it is wrong for the applicant's counsel to submit that a 'confirmation of sale' is not the same as an 'order confirming the sale' because once the sale is confirmed (as was done by the

learned senior assistant registrar in this case by the order dated 12 March, 2013) the sale was, by operation of that provision, absolute. A

[3] It again cannot be denied that it is implicit from this just-quoted provision that the application to set aside the sale must be made after one month from the date of sale and *before* the order making the sale absolute. It is equally obvious that the facts of this case do not fit into that provision as this application to set aside the sale was made after the order making the sale absolute. Regrettably, it is this legal and the factual matrix of this case that the learned senior assistant registrar did not appreciate — he professed himself to be without jurisdiction to set aside an order for sale when in fact what was intended to be set aside was the sale; not the order ordering the sale of the land at the first instance. For this very reason too, the cases submitted by the purchaser's counsel, the Federal Court case of *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 and the Court of Appeal case of *Malayan Banking Bhd v Koay Kang Chuwan & Anor* [2010] 5 MLJ 46 are not the authorities on point as they both concerned the setting aside of an order for sale of a charged land. The other case he cited, *Dr Michael Atun Wee v Malaysia Credit Finance Bhd & Ors* [1994] 3 MLJ 594 is not too far off the mark as it concerned an application to not just set aside the order for sale but the prohibitory orders upon which it was based and the order confirming the successful sale of the charged property but in the said case the applicant therein was one of the co-owners of the said property. The land was charged by a developer to whom the applicant and the other co-owners had executed a memorandum of transfer over the property. The order for sale was obtained by the bank which was the chargee for the land following a judgment in default obtained against the developer. The judgment centered on the issue of the right of the applicant to intervene after the order for sale has been granted and to apply to set aside the order for sale. The Federal Court, interpreting O 15 held that the right to intervene can only be exercised before judgment is entered and where the proceeding is still pending but not after it has been entered. I need also mention that in the *Malayan Banking Bhd*'s case, the order for sale was sought to be set aside on the grounds, inter alia, of irregularities raised in the service of the affidavit stating the amount owing under the charges and the inordinate delay of twelve years in making the application (from the date the order for sale was made). B C D E F G H

[4] In the case before me now, there are no procedural irregularities which could induce me to invoke O 2 r 1(1) of the Rules of Court 2012 in order to cure the same. The irregularity here actually goes right into the substance of the application itself. I have said earlier and I will say again — the application was made after the sale has been made absolute when the law actually requires it to be made before that. I simply cannot see how I could overcome this substantive defect even when I appreciate its apparently unjust result to the applicant. The I

plaintiff's counsel further submitted that the purchaser should have lodged a caveat on the land the minute he was declared the successful bidder and I in turn would say that the plaintiff should themselves be as vigilant by renewing the prohibitory order and ensuring that its life span covers the after sale period.

[5] The plaintiff's counsel also raised the issue of the purchaser's locus standi to file the application since he was never a party to this application for execution. This point should have been properly raised as a preliminary objection. Be that as it may, and, drawing an analogy from *Dr Michael Atun*'s as well as *Hong Leong Bank*'s case, once the sale has been made absolute and payment out ordered, the proceeding is actually put to an end. The recourse of the purchaser, in my view, is to file a fresh action for restituition and not by way of an application in this execution proceeding. The High Court case of *Haji Yahaya bin Haji Ahman & Anor v WE Perera & Anor* [1977] 1 MLJ 32 is no authority for the proposition made by the purchaser's counsel that the purchaser has locus standi because the applicants who sought to set aside the auction sale in the cited case were not the successful bidder at the auction but were the previous purchasers of the property. The successful bidder at the auction was in fact sued as a respondent in the case. Mohamad Azmi J held that the judgment debtor/land owner had no more interest in the land before the auction sale, having sold it to the first applicant and further held that the order for sale should not have been made in the first place. The 'bona fide purchasers for value' that His Lordship said has locus standi to bring the application were the ones who bought the land from the judgment debtor in the first instance and His Lordship was definitely not referring to the successful bidder as the purchaser's counsel would want me to believe. The facts and the ratio are, in other words different and not quite applicable to the facts of this case though the application is also one to set aside the auction sale.

UNJUST ENRICHMENT

[6] The purchaser's counsel submitted that if this application is not allowed, the plaintiff would be unjustly enriched from the payment of the purchase money since the purchaser has paid the null purchase price but yet did not get to own the land. To allow that purchase price to remain in the hands of the plaintiff would, he submitted be unjust. I totally agree with him that it is so but the solution, as I have just suggested is a fresh action, for restituition founded upon the law on unjust enrichment such was done in the case authority submitted by the purchaser's counsel himself, ie the Court of Appeal case of *Oriental Bank Bhd v Nordin Hamid & Ors* [2010] MLJU 1905 (Civil Appeal No W-02–1259 of 2005).

[7] I would accordingly dismiss the application but given that the plaintiff should share the blame for the purchaser's legal predicament by not ensuring

that the prohibitory order be extended, I would not order the purchaser to pay them cost but for each party to bear their own costs.

Appeal dismissed.

Reported by Kanesh Sundrum